

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

27134

FILE: B-211900

DATE: December 30, 1983

MATTER OF: C3, Inc.

DIGEST:

1. A protest contending that the brand name manufacturer of computer equipment specified in the solicitation created a sole-source procurement by refusing to furnish such equipment to the protester relates to a matter which GAO will not consider under its protest function.
2. GAO's examination of the government's determination of its minimum needs is only to ascertain whether the procuring agency's evaluations and conclusions are reasonable. The record shows that the procuring agency's need for brand name computer equipment to run the agency's automated procurement system was reasonable.

C3, Inc. (C3), protests the contracting officer's refusal to accept any other item sources other than the brand name listed in request for proposal (RFP) DAAJ04-82-R-0051, issued by the United States Army Troop Support and Aviation Materiel Readiness Command. The RFP was for computer equipment and related software plus maintenance that would be used in support of the Army's Procurement Automated Data and Document System (PADDS).

C3 contends that the RFP's requirement that the remote diagnostic units (RDU) be Perkin-Elmer Company (Perkin-Elmer) equipment was unduly restrictive of competition and that the Army should have accepted C3's offer of a "Perkin-Elmer compatible RDU." For the reasons set forth below, we find the protest to be without merit.

The PADDS procurement was originally solicited on a sole-source basis to Perkin-Elmer. However, because of the vendor response to a synopsis in the Commerce Business Daily, the Army canceled the sole-source solicitation and on September 14, 1982, issued the protested RFP on a competitive basis. Nevertheless, section C.2.d. of the RFP provided:

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"At each site, the Perkin-Elmer 3252 minicomputer system shall be equipped with a Perkin-Elmer RDU (Remote Diagnostic Unit). Remote diagnostic support of all Perkin-Elmer manufactured equipment and all Perkin-Elmer licensed software acquired pursuant to this procurement action shall be available from Perkin-Elmer through the use of their RDU."

Also, section C.2.e. of the RFP provided:

"Each item of equipment, each software product and each support service acquired pursuant to this procurement action, including the RDU and remote diagnostics support shall be commercially available Perkin-Elmer products already in use at no less than five other customer sites."

On the closing date for the receipt of initial proposals, October 15, 1982, C3 submitted a proposal which was silent as to how the company would fulfill the RFP's Perkin-Elmer RDU requirement, but otherwise took no exception to the requirement. By letter dated December 1, 1982, the Army asked for technical clarification of several areas of C3's proposal. In particular, the Army asked C3 the method by which the company would provide remote diagnostic support and also the location of the five customer sites where Perkin-Elmer products were already in use.

In its December 13, 1982, response, C3 stated that a comparable "version" of the Perkin-Elmer RDU had been developed by C3 during 1981 to 1982. C3 further stated that because Perkin-Elmer Publication No. 38-094-R07 specifically limits the availability of Perkin-Elmer RDU's to computer customers with maintenance contracts, the procurement requires the execution of a contract without the item and "the subsequent addition of the item via modification to the contract."

By letter dated January 11, 1983, the Army reemphasized the Perkin-Elmer RDU requirement and again asked C3 how it intended to fulfill this requirement. When C3 continued to propose an alternate method of satisfying the RFP's Perkin-Elmer RDU requirement, the Army, by letter dated March 10, 1983, informed C3 that its proposal was deficient in this area. However, the Army's March 10, 1983, letter also advised C3 that negotiations would still continue and that C3 would be notified when they would be concluded.

On March 21, 1983, C3 formally protested the Perkin-Elmer RDU requirement to the contracting officer. C3 alleged that if its response was not acceptable, the Army had in effect rendered the procurement a sole source to Perkin-Elmer or a joint venture controlled by Perkin-Elmer. In addition, C3 argued that if the Perkin-Elmer RDU was a justified need, it should be separated from the procurement and acquired under a sole-source procurement action. Nevertheless, C3 provided responses to all the other deficiencies noted by the Army in its March 10, 1983, letter.

The Army answered C3's letter on May 16, 1983, and stated the following with regard to the RFP's requirement for a Perkin-Elmer RDU:

"The requirement stated, 'Remote diagnostics support of all Perkin-Elmer manufactured equipment and all Perkin-Elmer licensed software acquired pursuant to this procurement action shall be available from Perkin-Elmer through the use of the RDU,' (Section C.2.d.). Your response proposed an alternate method that does not meet the Government's minimum requirements (Section C.10). The solicitation clearly required one vendor be responsible for all maintenance and that this maintenance include Perkin-Elmer remote diagnostic units and service. This requirement, like the rest of the requirements solicited, is for a brand name Perkin-Elmer product capable of being supplied by different firms. Maintenance cannot be split between two contractors. It must be the responsibility of one. Your proposal must meet the requirements of the solicitation in order to be technically acceptable."

The Army concluded by stating that discussions were closed and that best and final offers should be submitted on May 25, 1983.

C3 further alleges that when the Army notified it on May 16, 1983, that best and final offers were due, C3 began a "good faith" effort to obtain Perkin-Elmer's concurrence to offer Perkin-Elmer's RDU. According to C3, Perkin-Elmer on several occasions denied its request to offer Perkin-Elmer's RDU. In support of its allegations, C3 has furnished us with a copy of a Perkin-Elmer letter dated June 21, 1983, which states that Perkin-Elmer had decided not to subcontract "remote diagnostic support on the procurement outlined."

By letter dated May 24, 1983, and received by this Office on the same date, C3 protested the RFP's Perkin-Elmer RDU requirement on the ground that the Army's continued determination that C3 was technically unacceptable improperly made the procurement sole source to Perkin-Elmer contrary to the competitive procurement regulations.

An award was made to Perkin-Elmer on September 12, 1983.

The Army contends that C3's protest against the RDU requirement is untimely because our Office's Bid Protest Procedures require that protests based upon alleged solicitation improprieties apparent prior to the closing date for initial proposals (here, October 15, 1983) shall be filed prior to that date. See 4 C.F.R. § 21.2(b)(1) (1983). The Army emphasizes that C3's protest to it on March 21, 1983, was almost 6 months after the closing date. However, we note the Army received and evaluated revised proposals from C3 as late as May 16 and even after then requested a best and final offer from C3. Since C3 protested to our Office within 10 working days of the May 16 letter, we find the protest timely. See 4 C.F.R. § 21.2(b)(2) (1983).

Because of events which have occurred since the filing of C3's protest, we find that the issue of the timeliness of C3's protest against the RDU requirement is at this point academic. In its August 16, 1983, comments on the protest conference held at this Office on August 2, 1983, the Army stated the following:

" . . . It should be noted events have progressed since the original report. At this time, it appears only one contractor can fulfill the Government's minimum needs. This was not apparent two months ago when the original Administrative Report was filed. At that time, competing offers in compliance with the technical requirements were before the Government and there appeared to be one other offer capable of being brought into compliance with the technical specification. As noted by GAO at the 2 August hearing, the original equipment manufacturer of the hardware, software and Remote Diagnostics has now refused to sell through third party vendors, forcing upon the Government a sole source situation." (Emphasis added.)

In view of the above-quoted statement by the Army, we find that the Army was in effect conducting a sole-source procurement after August 16, 1983. This is not to say, however, that we consider the sole-source award to Perkin-Elmer improper. C3's argument regarding the propriety of Perkin-Elmer's limiting the availability of its products is essentially a matter which cannot be adjudicated by this Office. See Hopper Goode, Inc., B-209830, March 30, 1983, 83-1 CPD 329.

As to the Army's need for Perkin-Elmer equipment, our examination of the government's determination of its minimum needs is only to ascertain whether the procuring agency's evaluations and conclusions are reasonable. See American Chain & Cable Company, Inc., B-188749, May 23, 1978, 78-1 CPD 390. We find the Army's need for Perkin-Elmer equipment to be reasonable. The record shows that PADDS is a combination of computer hardware and software designed to expedite Army procurements by reducing the administrative time needed for the composition and preparation of procurement documents. PADDS has been installed at each of the five United States Army Materiel Development and Readiness Command's subordinate commands responsible for procurement and support of virtually all major materiel acquisitions.

The record further shows that in issuing the protested RFP, the Army was seeking new PADDS equipment because of (1) faulty existing equipment, (2) nonstandard computer parts and (3) equipment damage resulting from inadequate maintenance. This, in turn, resulted in partial and total systems breakdowns, including several subordinate commands being "down" for days and weeks at a time. The record specifically shows that at the time the procurement under the RFP was being conducted, only Perkin-Elmer-manufactured computer equipment was overall "compatible" with PADDS software.

C3 gives no evidence or argument against the Army's need for Perkin-Elmer equipment other than to allege that the requirement for a Perkin-Elmer RDU was "unjustifiable." However, the record reveals with respect to the Perkin-Elmer RDU requirement that that particular brand RDU was "tailored" to the Perkin-Elmer central processing units used by PADDS. Also, the record reveals that the Army did not want to procure remote diagnostic equipment from another manufacturer because it did not have the technical capability to resolve disagreements between Perkin-Elmer and the other manufacturer as to maintenance responsibilities under PADDS.

We deny C3's protest in part and dismiss it in part.

for *Harry R. Van Cleave*
Comptroller General
of the United States